of Committee to Investigate the Judicial System of Ohio, 1915. Proposed bill, Sec. 2.

Enactments allowing rules to supersede statutes have been upheld, generally upon the ground that such rule-making power is inherent in the courts. *Kolkman* v. *People*, 89 Colo. 8, 300 Pac. 575 (1931) *In re Constitutionality of Section 251-18, Wisconsin Statutes*, 204 Wis. 501, 236 N. W 717 (1931), *State* v *Superior Court, supra.*

The position of the court in *Busher* v. *Macek, supra*, seems to be entirely unjustified on either authority or reason. *Cleveland Railway Co.* v. *Halliday, supra*, cannot be considered as authority because that case was one involving substantive rights as distinguished from mere procedure. Nor is the case of *Van Ingen* v. *Berger, supra*, authority for the extreme position taken. As has been seen, the *Van Ingen Case* involved a direct conflict between the provisions of a statute and those of a rule of court. The *Busher Case* goes a step further by holding invalid a rule of court when in conflict with a legislative intent inferred from the silence or absence of a statute.

The view taken in the *Busher Case*, if carried to its logical extreme, would invalidate the bulk of the rules of court in this state. There are few subjects not in some way regulated by statute. Under the doctrine of the *Busher Case*, it would only be necessary to show that the subject is in some way regulated by statute. Then, if a rule of court regulates the same subject, even in an entirely different aspect, the rule would be void because the silence of the statute on the aspect of the subject regulated by rule must be inferred to mean a legislative intent that it should not be regulated. The logical implications of such a view should make the supreme court reconsider its position and support that of *State, ex rel. Shube*, v. *Beck, supra.* Until that is done, procedural reform by rule of court is impossible in Ohio, unless the legislature authorizes rules of court to supersede procedural statutes.

ABRAHAM GERTNER.

CONCLUSIVENESS OF FINDING OF DATE OF DEATH OF PRESUMED DECEDENT

Fanny Ernst, mother of George A. Webber, died on September 5, 1930. Morrissey as administrator of the estate of Webber, a presumed decedent, made demand of McCorry for the funds held by him as administrator of the estate of Fanny Ernst. The claim of Morrissey was based on the finding of the probate court of Hamilton County that the death of George A. Webber was presumed to have occurred subsequent to the death of his mother.

Smith, guardian of Medina Webber, joined with Walter Webber in this petition. They alleged that George A. Webber, father of Walter and Medina, had been absent and unheard from for a period of over eight years antecedent to the death of his mother; that the presumption of his death arose before the date of his mother's death, and that Walter and Medina were therefore her sole heirs and entitled to the proceeds of her estate.

It was held by the Court of Appeals, Fourth District, that the pleading of the petitioners was sufficient to create a legal presumption that George A.

Webber pre-deceased his mother. The court stated that the presumed decedent statute purports to bestow on the probate court authority to determine the date when the presumption of death from absence arises, but that such a finding does not conclude strangers to the degree; and that that therefore George A. Webber by the common law is presumed to have died seven years after he was last heard from and in the absence of evidence rebutting such presumption the petitioners are established as the legal heirs of Fanny Ernst. *Morrissey, Admr* v. *Smith, Gdn. et al.*, 17 abs. 240. (Decided, November 15, 1933.)

It has long been a rule of almost universal application that for all legal purposes a presumption of death arises from a continued unexplained absence from the domicile of the absentee for seven years, when the absentee has not been heard from for that period. *University v. Harrison*, 90 N. C. 387, (1887), *Samberg* v. *Knights of Modern Maccabees*, 158 Mich. 568, 123 N. W 25, (1909), *Youngs* v. *Heffner*, 36 Ohio St. 232, (1880), *Nichols* v. Clare, 32 O. C. A. 555, affirmed without opinion, 75 Ohio St. 600, (1906), *Oglesby* v. *Rose*, 21 Oh. Dec. 291, 11 N. P (N. S.) 188, (1910).

The common law rule as to the presumption of death is incorporated in the Ohio Statutes in Section 10636-1, where it is provided, that "A person shall be presumed to be dead after seven years continued absence, unheard of from his or her last domicile, and any person entitled to share in his or her estate may present a petition in the probate court in the county of his or her last domicile setting forth the facts which raise the presumpion of death."

The decree of the probate court of Hamilton County which fixed the date at which the presumption of death arose, is expressly authorized by the terms of Section 10636-4. "The probate court having become satisfied that the legal presumption of death is made out, the court shall so decree, and the court may determine in such decree the date when such presumption arose."

Freeman on Judgments Vol. 3, Section 1520 states that the proceeding in a probate court for the appointment of administrator is a proceeding in rem, or as sometimes stated "in the nature of a proceeding in rem, and without notice, in courts admitting wills to probate and granting administration, and the expectancies of heirs and distributees swept away, when the weakness of infancy, or residence in a foreign land, should, seemingly, protect them, because of the permanent political consideration that the rights of property thus situated should be speedily settled by a legal ascertainment of them." The decrees of the probate courts establish a status necessarily binding on all the world in cases where administrators are appointed. *In re Baker's Estate*, 170 Cal. 578, 150 P 989, (1915), *Tatem* v. *Wright*, 139 Md. 20, 114 A. 836, (1921), *Thompson* v. *Freeman*, 111 Fla. 433, 149 So. 740, (1933), *Cross* v. *Armstrong*, 44 Ohio St. 623, 10 N. E. 160, (1887), *Bucyrus Steel Castings Co.* v. *Farkas*, 15 N. P (N. S.) 609, 27 Oh. Dec. 220, (1914), *Ewalt* v. *Ames*, 6 App. 370, 27 O. C. A. 465, 29 O. C. D. 133, (1917).

Is the decree of the probate court of Hamilton County a decree in rem only as to the jurisdictional fact of death or the presumption thereof, or does it extend to and include the finding and decree that the presumption arose as of a specified date?

Many early cases are on record in which the courts have rendered decisions on this precise question. Freeman on Judgments, Vol. 3, Section 1520

states the principle behind these early cases: "Where a proceeding has been had in the nature of a proceeding in rem, whenever the judgment is drawn in question in another action affecting the same property or subject-matter, the facts found by the first tribunal which were necessary to the formation of the sentence pronounced are conclusive of the existence of such facts and can never be the subject of inquiry upon a subsequent investigation in another tribunal more than the sentence itself. *Pinson* v. *Ivey*, 9 Tenn. 349 (1830), *United States* v. *Hooe*, 3 Cranch. 73, (1806), *Fitzsimmons* v. *Newport Ins. Co.*, 4 Cranch. 195, (1808), *Gelstein* v. *Hoyt*, 3 Wheat, 246, (1818), *Jewett* v. *Jewett*, 6 Mass. 277, (1810).

The more recent cases disclose that the courts still adhere to this doctrine. In *In re Bloom's Estate*, (Cal.) 293 P 633, (1931), the court held that "a proceeding for the probate of a will is one instituted for the purpose of establishing the status of a written instrument; while the order admitting the same to probate is conclusive in subsequent proceedings as to the ultimate fact of the will, it is not save as to the parties litigant, or for the purpose of the proceeding itself, conclusive as to the facts upon which the question of will or no will depends." *Sorenson* v *Sorenson*, 68 Neb. 483, 103 N. W 455, (1903), *Clapp* v. *Vatcher*, 9 Cal. App. 462, 99 P 549, (1908), *Gasquet* v. *Fenner*, 247 U. S. 16, 38 S. Ct. 416, 62 L. Ed. 956, (1918).

Two comparatively recent New York decisions involved facts very similar to those presented in the principal case. The court in *In re Rowe*, 197 App. Div 449, 189 N. Y S. 395, (1921), stated, "A decrees of the Surrogate Court in proceedings to have an administrator of the estate of an absentee appointed is in no event an adjudication with respect to the time of the death of the absentee and binding on the surrogate of another county in a proceeding in which the exact date is material, since the date was not necessary to be established with exactness, and all the surrogate had to determine was that the absentee was presumed to be dead prior to the issuance of letters and accordingly fixed the date as the date of the decree authorizing the letters to issue." Affirmed without opinion, 232 N. Y 554, 134 N. E. 569. To the same effect is *Bering* v. *United States Trust Co. of New York*, 201 App. Div. 35, 193 N. Y S. 753, (1922).

While the court in the principal case cites no authority for its statement as to the conclusiveness of a finding as to the date of death, the decision is in accord with the doctrine established elsewhere by a long line of cases.

JAMES R. TRITSCHLER.

AUGMENTATION OF ASSETS BY MEANS OF CASH ITEMS

The Union Trust Co. was named trustee and distributing agent in connection with a bond issue put out by the plaintiff, the University of Dayton. It was provided in the trust instrument that the plaintiff was to make periodical payments into a fund out of which the trustee was to discharge the interest and the principal on the bonds. The first payment was made by a check drawn by plaintiff on its account in the commercial department of the trustee